U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0092 BLA
and 16-0093 BLA

MARSHA LENE HALL (o/b/o and Widow of RODNEY DWAYNE HALL)	)	
Claimant-Respondent	)	
v.	)	
TOPMOST COAL COMPANY, INCORPORATED	)	
and	)	DATE ISSUED: 08/29/2016
EMPLOYERS INSURANCE OF WAUSAU	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices PLLC), Lexington, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2011-BLA-5983, 2015-BLA-5317) of Administrative Law Judge John P. Sellers, III, awarding benefits on claims filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on October 1, 2010, and a survivor's claim filed on November 29, 2014.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited the miner with fifteen years and one month of qualifying coal mine employment,[3] and found that the evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant[4] invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis. The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim.

[1] Employer's appeal in the miner's claim was assigned BRB No. 16-0092 BLA, and its appeal in the survivor's claim was assigned BRB No. 16-0093 BLA. By Order dated January 15, 2016, the Board consolidated these appeals for purposes of decision only.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The record reflects that the miner's last coal mine employment was in Kentucky. Hearing Transcript at 12. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Claimant is the surviving spouse of the miner, who died on November 12, 2014. Director's Exhibits 5, 6.

The administrative law judge also considered claimant's survivor's claim. The administrative law judge noted that Section 422(*l*), 30 U.S.C. §932(*l*), provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. The administrative law judge determined that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to Section 932(*l*). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer generally contends that the administrative law judge erred in finding that the evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Miner's Claim

Employer argues that the administrative law judge erred in finding that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b) and, therefore, erred in finding that claimant invoked the rebuttable presumption that the miner's total disability was due to pneumoconiosis at Section 411(c)(4). Employer specifically contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[6]

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had over fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The administrative law judge found that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 17. The administrative law judge found that the blood gas study evidence was "inconclusive" and, therefore, did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Id.* at 18.

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Broudy and Rosenberg. Dr. Broudy opined that the miner "would be considered disabled from doing all of the arduous manual labor required of an underground coal miner, and in particular, the labor that [the miner] described in his job description."[7] Director's Exhibit 27-5. Dr. Rosenberg opined that the miner "probably was disabled from a pulmonary perspective." Employer's Exhibit 5 at 13. The administrative law judge found that the "unanimous" medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 19.

Employer contends that Dr. Rosenberg's opinion does not support a finding of a totally disabling pulmonary impairment because the doctor attributed the miner's pulmonary impairment to smoking. Employer's Brief at 4-5. Contrary to employer's contention, the cause of a miner's pulmonary impairment is not relevant to the issue of whether a miner is totally disabled pursuant to 20 C.F.R. §718.204(b). Disability causation is a separate element of entitlement. *See* 20 C.F.R. §718.204(c). As previously noted, Dr. Rosenberg opined that the miner "probably was disabled from a pulmonary perspective."[8] Employer's Exhibit 5 at 13. Therefore, substantial evidence supports the administrative law judge's finding that Dr. Rosenberg's opinion supports a finding of a totally disabling respiratory or pulmonary impairment.

Employer also contends that the administrative law judge should have accorded less weight to Dr. Broudy's opinion because he was not aware of the non-qualifying[9]

[7] Dr. Broudy noted that the miner's "job description includes general underground labor, which involved shoveling on the belt lines, rock dusting, and using a cutting machine and operating a scoop." Director's Exhibit 27-5.

[8] Although Dr. Rosenberg used the word "probably" in finding that the miner was totally disabled, the administrative law judge found that "whatever amount of absolute certainty is lacking from his opinion does not detract from the fact that ultimately he concluded that the preponderant evidence from his examination was that the [m]iner could no longer perform his earlier coal mine work from a respiratory standpoint." Decision and Order at 18-19. Because employer does not challenge this determination, it is affirmed. *Skrack*, 6 BLR at 1-711.

[9] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-

exercise blood gas study conducted by Dr. Rosenberg. We disagree. Drs. Broudy and Rosenberg each interpreted the blood gas studies that they conducted as revealing a gas exchange impairment at rest.[10] Director's Exhibit 11-18; Employer's Exhibits 2 at 10, 5 at 6-7. Moreover, Drs. Broudy and Rosenberg each indicated that the results of the blood gas studies that they conducted did not change after exercise. Director's Exhibit 11-18; Employer's Exhibits 2 at 10, 5 at 6-7. Although both of the resting blood gas studies produced non-qualifying values, test results that exceed the applicable table values may be relevant to the overall evaluation of a miner's condition if a physician states that they show values indicative of reduced pulmonary function. *Marsiglio v. Director, OWCP*, 8 BLR 1-190, 1-192 (1985). In this case, the administrative law judge permissibly found that the non-qualifying blood gas study evidence did not preclude Drs. Broudy and Rosenberg from interpreting the blood gas results as supportive of a finding of total disability. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984) (The determination of the significance of the test is a medical assessment for the doctor, rather than the administrative law judge); Decision and Order at 19. The administrative law judge, therefore, permissibly found that the opinions of Drs. Broudy and Rosenberg support a finding that the miner suffered from a totally disabling pulmonary impairment.[11] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Because it is supported by substantial evidence, we affirm the administrative

---

qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[10] Dr. Broudy interpreted the blood gas study that he conducted on October 24, 2010 as revealing moderate resting hypoxemia. Director's Exhibit 11-18. Similarly, Dr. Rosenberg opined that the blood gas study that he conducted on April 25, 2011 revealed a mild to moderate decrease in oxygenation at rest. Employer's Exhibits 2 at 10, 5 at 6-7.

[11] The administrative law judge noted that Dr. Rosenberg testified that the miner was wheezing and producing rhonchi when he was exercising during the April 25, 2011 blood gas study. Decision and Order at 13; Employer's Exhibit 5 at 13. Although the exercise portion of the April 25, 2011 study produced non-qualifying values, the administrative law judge noted that Dr. Rosenberg opined, based on his observations of the miner's performance "with the minimal amount of exercise," that the miner was probably disabled from a pulmonary perspective. Employer's Exhibit 5 at 13. Because Dr. Rosenberg opined that the miner was totally disabled from a pulmonary standpoint, even after considering the non-qualifying results from the April 25, 2011 exercise blood gas study, employer has not adequately explained why Dr. Broudy's lack of knowledge of these results would undermine his opinion.

law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Moreover, contrary to employer's contention, the administrative law judge weighed the medical opinion evidence with the pulmonary function study and blood gas study evidence, finding that, when weighed together, the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 19. Because employer does not allege any error in the administrative law judge's weighing of the evidence together at 20 C.F.R. §718.204(b)(2), this finding is affirmed. *Skrack*, 6 BLR at 1-711.

In light of our affirmance of the administrative law judge's finding that claimant established that the miner had over fifteen years of qualifying coal mine employment, and his finding that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption at Section 411(c)(4). 30 U.S.C. §921(c)(4).

Because claimant invoked the Section 411(c)(4) that the miner was totally disabled due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[12] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 19-26.

Employer alleges no specific error in regard to the administrative law judge's determination that it did not establish that the miner did not have clinical pneumoconiosis. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought

[12] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's finding that employer failed to establish that the miner did not have clinical pneumoconiosis. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis.[13] 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Employer contends that the administrative law judge erred in finding that employer could not establish rebuttal by showing that no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Employer specifically contends that the administrative law judge erred in his consideration of Dr. Rosenberg's opinion. We disagree. The administrative law judge rationally discounted Dr. Rosenberg's opinion that the miner's pulmonary impairment was not caused by pneumoconiosis because Dr. Rosenberg did not diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove clinical pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 26. Because employer does not allege any other error, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by proving that the miner's totally disabling impairment did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(ii).

Because claimant established invocation of the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits in the miner's claim is affirmed.

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her

[13] Therefore, we need not address employer's contentions of error regarding the administrative law judge's findings with respect to the existence of legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

entitlement under Section 932(*l*): that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on or after March 23, 2010; and that the miner had been determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Decision and Order at 27-28. Because none of these findings is challenged on appeal, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 932(*l*). 30 U.S.C. §932)(*l*); *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge